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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 733

STELLA PRUSA and CHRISTINE PRUSA,
Petitioners,

VERSUS

JOHN CERMAK, JAMES JIROUS, JOAN JIROUS, JANE JIROUS, ADOLPH CERMAK, JOE CERMAK, WESLEY CERMAK, ELIZABETH SWARTZ, ANNA SAWREY, GEORGIA HOCK, HELEN PEMBLETON and BLANCHE ADAMS; and the unknown heirs, executors, administrators, trustees, devisees and assigns, if any, immediate and remote of WENSEL HYNEK and W. HYNEK, and of JOSEPHINE HYNEK and of JOSEPH B. HYNEK, also known as JOSEPH HYNEK, and of FANNY A. PRUSA, also known as FANNY PRUSA, FANNIE PRUSA and FANNIE PRUCHA, and of ANTON PRUSA, and of ANNA CERMAK, and of JOSEPHINE JIROUS, also known as JOSIE JIROUS AND JOSIE HYNEK JIROUS, and of PAULINE HYNEK, also known as LENA HYNEK, each deceased,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November, 1966

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OPINION BELOW

The Petitioners' request for Writ of Certiorari is directed to the opinion of the Supreme Court of Oklahoma, rendered the 10th day of May, 1966, as reflected in the transcript at pages 129-133.

JURISDICTION

Jurisdiction should not be invoked, since this case is one for the partition of real property in the State of Oklahoma, between co-tenants. Neither the Constitution, nor any Statute or Treaty of the United States is involved or drawn in question.

QUESTION PRESENTED

Whether the opinion of the Supreme Court of Oklahoma, rendered May 10, 1966, affirming the trial court in granting partition of lands in Oklahoma between the parties hereto as co-tenants, is correct.

STATUTES INVOLVED

The partition statutes of the State of Oklahoma are involved in this case, Title 12, Oklahoma Statutes of 1961, Secs. 1501 to 1516, both inclusive. The particular sections pertinent here, are as follows:

Title 12, Oklahoma Statutes of 1961, Sec. 1501:

> "When the object of the action is to effect a partition of real property, the petition must describe the property and the respective interests of the owners thereof, if known."

Title 12, Oklahoma Statutes of 1961, Sec. 1509:

> "The commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be

made, the commissioners shall make a valuation and appraisement of the property. They shall make a report of their proceedings to the Court, forthwith."

Title 12, Oklahoma Statutes of 1961, Sec. 1510:

"Any party may file exceptions to the report of the commissioners, and the Court may, for good cause, set aside such report and appoint other commissioners, or refer the matter back to the same commissioners."

The Petitioners' claim that Title 42, U.S.C.A., Sec. 1988, and also Article 12, Sec. 2, of the Oklahoma Constitution, relating to exemptions to Oklahoma homesteads, are applicable in this case, is incorrect.

STATEMENT OF THE CASE

The statement of this case is substantially set forth in the Petitioners' brief, pages 6, 7 and 8.

ARGUMENT

I.

The decision below is clearly correct.

The Supreme Court of Oklahoma, in its opinion of May 10, 1966, held that its careful examination of the record disclosed no legal reason for denying partition, and that appellants' (the Petitioners herein), opposition thereto was, at most, a mere unwillingness that partition be made.

In support of this, the Court reviewed a number of its prior holdings in cases of this kind, all of which went to support the decision in this case.

II.

The claim of the Petitioners that the Supreme Court of Oklahoma has permitted the partition of a homestead belonging to the Petitioners in Tract No. 1, is erroneous.

The Petitioners cannot claim homestead rights in Tract No. 1, as suggested by their brief, even though this property was acquired by their mother by Federal grant, July 26, 1899. Regardless of the question of whether their mother occupied this property as a homestead under this Federal grant, the facts are as shown in this case, and in the judgment of the trial court granting partition, that the mother of said Petitioners conveyed all of said Tract No. 1 to her father, Wensel Hynek, by Warranty Deed, dated December 4, 1899. Of course this deed extinguished the homestead, if it existed. Wensel Hynek was the grandfather of the said Petitioners, and as far as their case is concerned, he was the original owner of said Tract No. 1, and on his death the title passed by descent and in some instances by intervening deeds, so that the undivided interests eventually vested in the parties to this partition case, as co-tenants.

III.

The Petitioners' claim that their 48/240 undivided interest in Tracts Nos. 1 and 3, should not be partitioned, since they held the title to said interests as joint tenants with full rights of survivorship, is erroneous.

The Petitioners do not deny that the title to these lands was held in undivided interests, and that the ownership was held by the parties in co-tenancy. Their claim is that their ownership to this 48/240 interest to these tracts

is as joint tenants with the right of survivorship, and that their said ownership is different from the other interests which are as co-parceners, or as tenants in common, and that since their co-tenancy is different, partition cannot be had of their said interests. This issue was decided against them in the opinion of the Supreme Court of Oklahoma, dated May 10, 1966. There it is stated the claims of Petitioners, that all of the undivided interests must be held in one of the enumerated types of co-tenancy, is without foundation. The requisite is that there shall be a co-tenancy either as tenants in common, joint tenants, or co-parceners. But, now the Petitioners say that at common law, the right of partition applied only to co-parceners, and that the Oklahoma statutes have simply adopted the common law rule without expansion, so that the effect is co-parceners may partition among themselves, but they cannot force joint tenants to partition with them. This is certainly not the case, and the Supreme Court of Oklahoma has so held. In *North* v. *Coffey*, 200 Okla. 44, 191 P.2d 220, it is stated:

> "As pointed out in Pomeroy's Equity jurisprudence, 4th Ed. Vol. 5, section 2124, 2125, at common law the writ of partition lay only in cases of lands held in coparceny. It was extended by statute, 12 O.S. 1041, 1501 et seq., to joint tenancy and tenancy in common, . . ."

In the same opinion, it is further stated:

> "Our statute was adopted from Kansas (Hargis v. Hargis, 181 Ok. 377, 73 P.2d 1129), and as construed by the Kansas Courts it conferred jurisdiction upon the Courts in the partition of estates only when there was co-tenancy between the parties. Love v. Blauw, 61 Kan. 496, 59 P. 1059, 48 L.R.A. 257, 78 Am. St. Rep. 334, Bartram v. Kemp, 113 Kan. 246, 214 P. 96. The

statute is procedural only, and was intended to apply to situations to which partition would be applied under the common law and equitable rules existing prior to its adoption."

Partition under the modern practice, combining both the equitable and common law remedies, is defined as follows:

"* * * a division between two or more persons of real or personal property which they own as coparceners, joint tenants, or tenants in common, effected by the setting apart of such interests so that they may enjoy and possess the same in severalty, * * * 47 C.J. p. 266, section 1: 40 Am. Jur. p. 4, section 2; Sweeney v. Bay State Oil & Gas Co., 192 Okl. 28, 133 P.2d 538.

"Under this modern doctrine it is applicable only to cases in which the property is held in cotenancy."

Suits for partition may be maintained by co-tenants of every class. In 68 C.J.S. 81, the rule is stated as follows:

"By virtue of these statutes having been adopted as a part of the common law, or by the enactment of statutes in terms so providing, it is now generally held that suits for partion may be maintained by cotenants of every class, namely, by coparceners, tenants in common, and joint tenants. The right to maintain a partition suit is, however, confined to cotenants. One of the cotenants cannot, by any act of his, defeat, defer or limit the rights of his cotenants to partition. With respect to estates held in joint tenancy, it has been held no objections to partition that it destroys the right of survivorship."

As co-tenants of every class may maintain actions for partitions, so all classes of co-tenants may be sued for partition. The rule is stated in 68 C.J.S. 94, as follows:

"As cotenants of every class, namely, coparceners, tenants in common, and joint tenants, may maintain actions for partition, under principles discussed supra 56 a, so all classes of cotenants, irrespective of the mode by which the tenancy was created, may be sued for partition; and this is true although the cotenant is an artificial person such as a municipality, holding title to real property in common with an individual."

It makes no difference if the Petitioners hold an undivided interest in these lands as joint tenants, with the right of survivorship. This interest is still an undivided interest, and is in co-tenancy with the other shares, and is therefore subject to partition. Although Petitioners hold an undivided interest in joint tenancy to Tract No. 2, they do not object to its partition.

IV.

Petitioners' claim that the report of the commissioners should have affirmatively shown why manifest injury would be caused by appraising the lands in lieu of making partition in kind, is erroneous.

The commissioners appointed by the trial court filed their written report (Transcript 61-64), wherein they certified that partition of each of the tracts of land involved in this case could not be made between the parties according to their respective interests without great and manifest injury to said parties, and they further certified and reported a careful valuation and appraisal for each of said tracts. This report clearly shows that the commissioners followed the procedure required by the applicable Oklahoma Statute, Title 12, Oklahoma Statutes of 1961, Section 1509, which reads as follows:

> "The commissioners shall make partition of the property among the parties according to their respective interests, if such partition can be made without manifest injury. But if such partition cannot be made, the commissioners shall make a valuation and appraisement of the property. They shall make a report of their proceedings to the Court, forthwith."

These commissioners were not required by this section of the statute to spell out in the report their reasons why partition could not be made in kind. The rights of the parties are amply protected against any possible irregularity of the commissioners by filing written objections to the commissioners' report. The procedure for this is provided by Title 12, Oklahoma Statutes of 1961, Section 1510, which reads as follows:

> "Any party may file exceptions to the report of the commissioners, and the Court may, for good cause, set aside such report, and appoint other commissioners, or refer the matter back to the same commissioners."

In the case here, the Petitioners took advantage of their legal right to object in writing to the commissioners' report. These objections were heard by the trial court, and after a hearing thereon, the objections were denied (Transcript 71-84). The proof introduced by the Petitioners at this hearing was clearly insufficient to form a valid objection. On the contrary, their evidence confirmed the report of said commissioners (Transcript 84-85).

In this case the report filed by the commissioners was proper on its face, and therefore at the hearing every reasonable presumption was applied in favor of the regularity of their proceedings, the correctness of their conclusions,

and the fairness thereof, in the absence of any evidence to the contrary. The burden of proof rested on the objecting parties who were the Petitioners herein, and it was up to them to repel said presumptions by proving facts contrary thereto. No such evidence was offered in this case by the Petitioners.

CONCLUSION

No valid reason exists for review by the Court of the opinion below of the Supreme Court of Oklahoma, and therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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